Office-Supreme Court, U.S.
FILED
SEP 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-151

Supreme Court of the United States

October Term, 1983

STATE OF OHIO,
Petitioner,

vs.

RAYMOND WALKER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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The Respondent, Raymond Walker, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 703 F.2d 959.

REASONS WHY THE WRIT SHOULD BE DENIED

The United States courts below concluded that Respondent was denied due process of law in violation of the Constitution of the United States by the admission of irrelevant and prejudicial evidence in the criminal trial in the Ohio court. Petitioner's contention that they determined Ohio law is simply not supported by the opinions.

Respondent, Raymond Walker, was tried and convicted in September, 1976 of a murder which occurred on

July 22, 1972. Walker's defense was that from April 14, 1972 until August 1, 1972 he was incarcerated in the Cuyahoga County Jail. The prosecution conceded that the records of the Sheriff of Cuyahoga County and of the Court of Commons Pleas of Cuyahoga County reflected incarceration. To gain the day, however, the prosecution fired every salvo available to it, including bringing out evidence of the conviction of Major Edward Payne, who became warden of the Cuyahoga County Jail a year after Walker was released, for theft of property from the Jail; investigation in 1976 by the Ohio State Auditor of the commissary records of the Sheriff; the fact that the Sheriff was resisting the investigation; gambling, use of drugs and a hunger strike in the Jail; investigation of Jail conditions by community groups; alleged impediment of extradition proceedings against Walker by Cuyahoga County; alleged threats to certain prosecution witnesses by unidentified individuals; and alleged note taking by a deputy sheriff during the trial with the implication that he was feeding information to the witnesses called by the defense from the Sheriff's office. Much of the prosecution's evidence was buttressed by the waiving of newspaper articles pertaining to those matters.

The trial court was of some assistance, commenting that the evidence pertaining to Major Payne was "very relevant"; bracing an imperfect identification of the defendant with the comment that "the record will show that the defendant looks very similar like the man that she saw shoot her husband"; reprimanding a deputy clerk of courts from Cuyahoga County who manifested his resentment toward an abusive cross examination with the reminder that he was not in Cuyahoga County; calling prosecution witnesses by their first names; accusing defense counsel of failing to return a transcript of the trial of one of the

alleged accomplices, a prosecution witness; and, on his own initiative, inducing John Appling, who had unequivocally stated he knew nothing and was not going to testify, to state his name and the fact that he was confined in the Ohio Penitentiary, and then permitting questions of other witnesses concerning the fact that Appling had been in the Cuyahoga County Jail at the time that Walker was in Jail.

The Ohio Supreme Court in review, *State v. Walker* (1978), 55 Ohio St. 2d 208, held that everything goes, commenting at page 214:

> We find the Court of Appeals' resolution of this proposition below to be well reasoned. Specifically, appellant presented various records of the Cuyahoga County jail which showed that he should have been in the jail at the time decedent was killed. The Court of Appeals found that having offered the records as proof of the truth therein stated, as well as proof of the facts reasonably to be inferred therefrom, appellant placed in issue the credibility generally of the records, the record-making process and the record keepers.
>
> Upon a review of the contested testimony, we find that it was relevant, in that it tended to disprove the accuracy of the jail records, which was a question in dispute in the instant cause. The contested evidence went to the credibility of the various jail records by demonstrating the overall inefficiency of the persons and the system in which they were maintained and the general lack of inmate supervision.

Contrary to Petitioner's contention, the Sixth Circuit and the District Court did not base their opinions upon Ohio law on the admissibility of evidence, but rather upon

the constitutional guarantee to due process. The Sixth Circuit, in *Walker v. Engle*, 703 F.2d 959 (6th Cir. 1983) at page 968 held (page A18 of the Petition):

> It is clear that the cumulative effect of the conduct of the state was to arouse prejudice against the defendant to such an extent that he was denied fundamental fairness. The trial was inflamed by marginally relevant and irrelevant evidence that was highly prejudicial. The contrary contentions of the state are supported by neither controlling authority nor considerations of fairness and justice. By allowing the trial to focus more on the claimed corruption of the Sheriff's Department than on the issue of Walker's guilt or innocence, the trial court denied Walker due process of law in violation of the Constitution.

And the District Court, at page A24 of the Petition, commented:

> The Trial court permitted the introduction of testimony so irrelevant, prejudicial and inflammatory that it "undermined the integrity of the fact finding process and a fair determination of the principal fact in issue," that is, Walker's alibi defense. (See Habeas Corpus Petition, p. 2). The trial errors "offend a sense of justice," *Rochin v. California*, 342 U.S. 165, 173 (1952), and cannot be considered harmless beyond a reasonable doubt. See *Champion v. California*, 386 U.S. 18 (1967).

The relevancy of evidence is a question of law and therefore a state court determination is not entitled to the presumptions set forth in 28 U.S.C. §2254(D), *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Similarly, the violation of Walker's constitutional rights is, of course, a matter of federal law and a state court determination is not entitled

to any presumption, *Brewer v. Williams*, 430 U.S. 385 (1977).

Petitioner strains to make a fact out of the state court of appeals' finding that Walker's counsel failed to object to Appling's taking the stand. In the first place, as pointed out by the Sixth Circuit at 703 F.2d 965, page A11 of the Petition, Walker's counsel made it clear that he opposed Appling's testimony. Furthermore, as pointed out by Judge Brown in his concurring statement at 703 F.2d 970, page A21 of Petition, the damage occurred through the questioning of other witnesses concerning Appling over numerous objections.

The prosecution's tendency to use every tool to its advantage, ignoring the other consequences, is manifested by the Petition. In its statement of the case, it points out that Walker, in his first trial, four years after the incident, procured a friend to testify that on the day of the murder they were drinking together. This is offered obviously to impute the veracity of Walker. On the other hand, admitting that Walker had been in the Cuyahoga County Jail, without embarrassment it has pictured him as a super criminal capable of slipping out of the Jail, committing a murder and sneaking back into the Jail undetected, but after performing this remarkable feat, upon apprehension completely forgetting his perfect alibi.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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